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Yale Law School

Year 2007

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Bush v. Gore as Precedent

Chad W. Flanders  
Yale Law School, [chad.flanders@aya.yale.edu](mailto:chad.flanders@aya.yale.edu)

## Bush v. Gore as Precedent\*

“While the Court in *Bush v. Gore* stated that its ‘consideration is limited to the present circumstances,’ I believe that statement was not meant to deprive the decision of all precedential weight but, rather to make clear that the precise facts of the case were unique.” John Roberts, at his confirmation hearing.<sup>1</sup>

“Come on, get over it.” Antonin Scalia, referring to *Bush v. Gore*.<sup>2</sup>

Is *Bush v. Gore* good law? There are several senses which we can give to this question, and each sense potentially yields a different answer. According to many – including many law professors – the answer to the question is clearly no, because *Bush v. Gore* was a poorly, even insincerely, reasoned decision: the case isn’t good law because the reasons it gave for its decisions were bad ones, of dubious coherence, and cobbled together (it was alleged by some) in order to defend a desired political outcome. Yet in another sense, the answer to the question of whether *Bush v. Gore* is good law is obviously yes: the decision was made, it was followed, and George W. Bush became President.

In this essay, I am interested in a third sense of the question, one which does not look back to the decision as it was made or immediately after, but which looks at the status of the decision now, today. Is *Bush v. Gore* good law in the sense that it still should be followed and

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\* Thanks to Will Baude, Owen Fiss, Pamela Karlan, Stephen Sachs and Mark Kressel for conversations on the issues in this essay and for comments on a previous draft. I also thank Orin Kerr for helpful correspondence. An earlier (and much shortened) version of some parts of this paper was published as Chad Flanders, *Please Don’t Cite This Case!: The Precedential Value of Bush v. Gore*, 116 YALE L.J. POCKET PART 141 (2006), <http://thepocketpart.org/2006/11/07/flanders.html>.

<sup>1</sup> Rick Hasen, *More of Judge Roberts’ Views on Bush v. Gore and Voting Rights*, Election Law Blog, Sept. 23, 2005, <http://electionlawblog.org/archives/004057.html> (quoting now Justice Roberts).

<sup>2</sup> Marty Lederman, *Justice Scalia Announces Opposition to Trials in Civil Courts for Alien Military Detainees*, SCOTUSblog, March 25, 2006, [http://www.scotusblog.com/movabletype/archives/2006/03/justice\\_scalia.html](http://www.scotusblog.com/movabletype/archives/2006/03/justice_scalia.html).

heeded by the lower federal courts? In a word, did *Bush v. Gore* set a *precedent* that other courts are bound to follow? This question is harder to answer than it looks, partly because it is true that *Bush v. Gore* was not entirely lucid in its reasoning (leaving it open what principle it propounded, if any), and partly because *Bush v. Gore* seem to contain within itself instructions on how to treat the case in the future. Famously or infamously, *Bush v. Gore* announced that the case was “limited only to the present circumstances.”<sup>3</sup> It was as if the court had put in *Bush* a “self-destruct” clause, which destroyed the case’s value as precedent the moment it was decided.<sup>4</sup>

The issue is of more than merely theoretical interest. Indeed, the question of whether *Bush v. Gore* is good law has become the focus – even the focal point – of a recent 6th circuit decision, *Stewart v. Blackwell*.<sup>5</sup> In that case, the decision turned partly on whether or not to treat *Bush v. Gore* as a precedent. The majority, seeing *Bush v. Gore* as the last in a long line of equal protection case, saw the court’s decision in *Bush* as binding precedent. Even if the reasoning was murky in that case, the court concluded, it still was obliged to follow it.<sup>6</sup> The dissent disagreed, citing both the limiting language and also the fact that the Court despite having

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<sup>3</sup> *Bush v. Gore*, 531 U.S. 98, 109 (2000).

<sup>4</sup> See Samuel Issacharoff, *Political Judgments*, U. CHI. L.R. 637, 650 (2001) (describing *Bush v. Gore* as “the classic ‘good for this train, and this train only’ offer”); Guido Calabresi, *In Partial (but not Partisan) Praise of Principle*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY* 80 (Bruce Ackerman, ed. 2002) (“Will history hail the courage—the willingness to risk obloquy of Justices O’Connor and Kennedy in writing an opinion that was designed to self-destruct?”). Ruth Bader Ginsburg has also remarked that “I doubt it [*Bush v. Gore*] will ever be cited as precedent by the court on anything.” See Jeffrey Rosen, *Rematch*, NEW REPUB., September 27, 2004, available at <http://www.tnr.com/doc.mhtml?i=20041004&s=rosen100404>.

<sup>5</sup> *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006), *vacated*, No. 05-3044 (6th Cir. July 21, 2006). The case is now awaiting a rehearing by the Sixth Circuit *en banc*. However, the plaintiffs have requested that the case be remanded to the district court and declared moot.

<sup>6</sup> *Id.* at 874 n.22 (“Whatever else *Bush v. Gore* may be, it is first and foremost a decision of the Supreme Court of the United States and we are bound to adhere to it”).

several opportunities to cite *Bush*, had not done so.<sup>7</sup> The debate over the value and merit of *Bush v. Gore* has moved from the pages of law reviews to the decisions of courts.<sup>8</sup>

My essay treats the thorny question of the precedential value of *Bush v. Gore* from three angles. In the first part, I look at the history of the Supreme Court limiting its decisions to the facts of present case. The venture into history is designed to test the argument made by some that the language limiting the reach of *Bush v. Gore* is an innocuous example of narrowing the scope of the principle propounded in *Bush*, rather than an objectionable restriction of the ruling to only one unique set of circumstances – the circumstances of *Bush v. Gore*. The second part of my essay looks at the question of precedent from a more theoretical angle. What does it mean for an opinion to have precedential value, as opposed to being good only for a single case? Finally, in the third part, I examine in detail how the issue of *Bush v. Gore* as precedent has played out in two recent cases, one in the 9th circuit and one the 6th circuit.

I should state at the outset that I will not, for the most part, be speaking in this essay directly to the merits of the equal protection claim. Some progressives have seen that part of *Bush v. Gore* as potentially redeeming that decision, by using it to compel state courts to spend money on voting machinery in poorer districts.<sup>9</sup> This, indeed, was and is the hope of the plaintiffs in the *Stewart* and *Shelley* litigation. My essay moves at a higher level of abstraction than whether the equal protection claim is persuasive. It asks, rather, about whether lower courts are bound at least to try to follow what the court said about equal protection in *Bush v. Gore*, not merely as a matter of persuasive authority, but as a matter of binding precedent.

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<sup>7</sup> “I believe that we should heed the Supreme Court’s own warning and limit the reach of *Bush v. Gore* to the peculiar and extraordinary facts of the case.” *Stewart v. Blackwell*, 444 F.3d 843, 886 (Gilman, R., dissenting).

<sup>8</sup> Interestingly, as I explain *infra*, part III, the decision in *Stewart* involved differing interpretations of a law review article by Rick Hasen. See Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FL. ST. U. L. REV. 377 (2001).

<sup>9</sup> In fact, I think the issue here is very complicated, forcing a balance between legitimate equal protection concerns and the (realistic) risk that courts will treat every difference in voting machines as a potential equal protection violation. See my brief discussion of *Shelley*, Part III, *infra*.

The theoretical upshot of my paper is minimal. What I want to establish is that there exists a real tension (even a contradiction) in *Bush v. Gore*, between the opinion as a whole and its limiting language. That conflict can only be settled by further action by the Supreme Court; given this tension, it is only a further act of judicial will that can settle the matter. Either the Court must in a later opinion limit the facts of *Bush v. Gore* to *Bush v. Gore*, or explain the true scope of the equal protection principle. What lower courts should do now, I suggest in the final part of my paper, is try their best to interpret the scope of the equal protection clause on their own, waiting ultimately for further guidance from the Supreme Court.

## I. History

In an important essay on *Bush v. Gore*, Charles Fried responds to critics who point to the limiting language of that case as proof that the court “explicitly embraced lack of principle, ad hocery, vulgar partisanship.”<sup>10</sup> They, however, are wrong in so alleging, Fried goes on, for in fact “every student of the Supreme Court knows that it is canonical for the Court, when it decides for the first time an issue on an unusual set of facts, to issue such a caveat. It almost a boilerplate.”<sup>11</sup> Fried’s claim is ambiguous. On a first impression, he seems to be saying that it is a commonplace that the court will, when confronted with an unusual set of facts, limit the holding only to that case, and that this is, as he says, almost “canonical.” But in fact, as I hope to show, this is not true when we look at the court’s past uses of limiting language. If we consider

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<sup>10</sup> Charles Fried, *An Unreasonable Reaction to a Reasonable Decision*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY* 15 (Bruce Ackerman, ed., 2002).

<sup>11</sup> *Id.* See also Owen Fiss, *The Fallibility of Reason*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY* 88 (Bruce Ackerman, ed., 2002) (“Such disclaimers are commonplace in common-law decisions. They do not disavow principle, but rather warn against overreading the principle articulated”); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1153 n.49 (2002) (calling the Court’s limiting language “boilerplate”).

the limiting language in *Bush v. Gore* to be limiting the holding *only* to the facts in *Bush v. Gore*, then we indeed have a rather idiosyncratic and not canonical use of limiting language – that is, not mere “boilerplate.” Insufficient attention, I think, has been paid to the strangeness of the limiting language of *Bush v. Gore*. The deeper, theoretical question it raises is: can the Supreme Court negate the precedential effects of its own ruling, simply by saying so? In this part, I deal with the history of the Supreme Court’s use of limiting language.

### 1. Narrowing v. Limiting

I said above that Fried’s statement about the use of limiting language in *Bush* is ambiguous and said that it appears to say that language limiting a case to its facts is canonical. But I do not think this is the best reading of Fried. In presenting the use of language to the effect that a case is limited to its facts as canonical, Fried I think means to refer to a tradition in the Supreme Court’s jurisprudence that is better conceived of as *narrowing* rather than limiting. When the Court narrows a case, it issues a warning that the principle it is applying is one that will only be applicable in a few instances, and that future courts should be careful in using that principle: they should be careful, that is, that the “narrow” principle actually does apply to the present facts as it did to the facts in the previous case. The idea that more cases should be narrow rather than broad has recently enjoyed a vogue in the writings of Cass Sunstein, who has championed a “minimalist” jurisprudence.<sup>12</sup> But it is important to note that narrowness is not the same as limiting the case to only apply to the facts at hand. Narrowness, in the sense I am talking about, is still principled, meaning that it articulates a rule that is potentially applicable to cases beyond the present one.

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<sup>12</sup> See CASS SUNSTEIN, ONE CASE AT A TIME (1999).

An example of the Court's use of limiting language to mean narrowness would be useful to lay out, for they show especially how limiting language might be thought to be compatible with the concept of narrowness. A particularly good example is the infamous case of George Carlin's eight dirty words, in which the court allowed sanctions against the comedian.<sup>13</sup> In a dissenting opinion, Justice Brennan said that he was dissenting from the opinion, despite the fact that its holding was "limited to the facts."<sup>14</sup> The Court, however, in its majority opinion, did not explicitly claim to be limiting the case only to the facts, so that its opinion was only a one time ticket. Rather, what the court said in its conclusion was that "It is appropriate ... to emphasize the narrowness of our holding." The opinion went on to emphasize the importance of the fact that the case did not involve a private conversation, but was instead aired on television, nor did Carlin speak his words as a line in "a telecast of an Elizabethan comedy."<sup>15</sup>

This kind of narrowness found in the majority opinion does not entail that the case is limited only to its facts, with the result that there is no principle behind the case that could be extended and applied in other, similar circumstances. In making it clear that the holding is "narrow" it only makes distinctions about when and where the principle applies, not that the principle applies in this case only. Indeed, the idea that the holding is narrow assumes that the principle behind the case can be applied elsewhere, and gives instructions on when to decide when the principle applies (although it certainly cannot be completely exhaustive in this, and it will be the work of other courts to determine how narrow the principle in fact is). There does not seem to be anything especially controversial in this, and to say that this is "canonical," does not seem to be very far off the mark even though it may be something of an exaggeration to assume that this happens in all cases with novel facts.

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<sup>13</sup> F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978).

<sup>14</sup> *Id.* at 772 (Brennan, J., dissenting).

<sup>15</sup> *Id.* at 750.

With the example of *Pacific Federation* in mind, we can ask whether *Bush v. Gore* is indeed a case that limits itself to the facts, or whether it can be read, as Fried intimates, as more of a narrowing case. Is *Bush v. Gore* best read as an exercise in minimalist jurisprudence, controversial as a matter of principle, but yet for all that a matter of principle? It seems certain that at least a plausible case can be begun to be made for this reading of *Bush v. Gore*. Like *Pacific Federation*, *Bush v. Gore* indicates the conditions for the application of its (equal protection argument). The opinion states: “The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.”<sup>16</sup> The opinion goes on to limit the focus of the equal protection principle to cases where there is a question of a statewide remedy for voting recounts. This is not too different from the *Pacific* case, where the court issues a narrow holding, which is not for all that an unprincipled one: it is just that the principle will only be operative in certain contexts.

This case can certainly be made, and many have made it with some success. But we should ask whether the Court intended its opinion to be read in this way. After all, we might read the description of the situation not as a narrowing of the scope of the principle’s application, but as instead something akin to a description where the court is deliberately describing *only* the case in front of it. To do this would be to make the case not merely minimalist, but “subminimalist,”<sup>17</sup> so that it would be narrowing its principle to such a degree that only one case (*Bush v. Gore*) could be captured by the principle. In other words, a description of circumstances could be read as effectively limiting the principle to the present case: the situation could be rendered in so much detail, and be so specific, that the principle would effectively be empty. Could the court have intended this reading, rather than the reading

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<sup>16</sup> *Bush v. Gore* at 532.

<sup>17</sup> Cass Sunstein, *Order Without Law*, in *THE VOTE* 215 (Cass R. Sunstein & Richard A. Epstein, eds., 2001) (“In fact this was a subminimalist opinion, giving the appearance of having been built for the specific occasion”).

that treats the description as “narrowing”? Or might the court merely have been suggesting a more or less narrow opinion?

The answer to these questions depends, I think, on how we are to read the Court’s infamous phrase that the consideration is limited to the present circumstances. If we could be assured (as Fried seems to be) that the language of limiting always meant merely narrowing, then there would be no problem with the minimalist reading. In other words, if we knew that when a court said it was limiting its decision to the present circumstances or to the facts at hand it was merely saying (in shorthand) that the principle to be applied was a narrow one and not a broad rule and that future courts needed to be careful in applying the principle, then we could read *Bush v. Gore* as merely saying what *Pacific Federation* did about its case, viz., that the principle being articulated was a narrow one, but one that could potentially be at play in other cases. The two cases would be nearly analogous.

In fact, I think that nearly the opposite is the case, and to treat the discussion of the circumstances which follows the limiting language would be to miss out on the message that the Bush court sends about the precedential status of *Bush v. Gore*, if the Court in Bush is following the Court’s past uses of limiting language. Assuming that the limiting language is not accidental, that is, it must be taken as controlling the discussion of the ‘broader’ circumstances that the case deals with, with the result that those circumstances need to be taken as simply *repeating* the idea that the principle discussed applies only to the facts and not as suggesting that there is (merely) a narrow principle at work.

We can anticipate my argument in the next section by noting that the phrase “limited to its facts” appears not in the *Pacific Federation* majority opinion, characterizing its own opinion, but rather in the dissent by Brennan. And this is a salient fact, because the majority opinion

agrees with the principle it is expounding *and Brennan does not*. Brennan is interpreting (or misinterpreting) the majority's opinion so that he can limit the result; he is not agreeing with the principle that the majority lays out, however narrow that principle turns out to be. So even in the case of *Pacific Federation*, we do not have an instance in which limiting the case to the present facts means merely adopting a narrow principle. As we shall see, there is no clear example of limiting language meaning "narrowing" in the sense of restricting the principle, rather than rendering the principle empty by limiting it to a single case.

## 2. The Uses of Limiting

*Pacific Federation* superficially appeared to be a case where limiting language was used in a narrowing way, rather than a limiting way simpliciter. But this was an illusion created by the fact that the "limiting" was being done in a dissent, rather than something that occurred in the majority opinion. In fact, there is no opinion in the history of the Supreme Court that involves the majority opinion limiting *itself* to the facts of the case. So in this section, I rehearse some of this history, in order to make two points. The first is that the language of limiting a case to its facts is employed *after* the case is decided, and never in the majority opinion of the case itself.<sup>18</sup> The second point is that limiting is written about in terms that clearly indicate that the effect of limiting is to overrule the principle articulated in the previous case, by cabining its principle to a single case and by doing so, make the principle empty. The fact that in *Bush v. Gore* we have limiting language in the majority opinion is unique in the history of the Supreme Court. Of course, that it is unique does not thereby mean that it is wrong or it is impossible; we need a theory to show that, which is what I turn to in the next part.

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<sup>18</sup> See Chad Flanders, *Limited to the Present Circumstances*, 117 YALE L. J. (forthcoming 2007).

Let me start with the second point first, in order to show what the consensus meaning of limiting the facts is before citing examples of cases that limit the holding of a previous case to the facts. In general, the device of limiting a case to its facts is a way of disagreeing with the principle of the previous case, by cabining that principle. So it is not unusual to see a Justice state something such as “even if the *Griffin* line were sound, *Mayer* was an unjustified extension that should be limited to its facts, if not overruled.”<sup>19</sup> The connection between limiting a case to its facts and overruling it is made explicit in Kennedy’s concurrence to *Minnesota v. Carter*, when he states that “the analysis in *Rakas* must be respected with reference to dwellings unless that precedent is to be overruled or so limited to its facts that its underlying principle is, in the end, repudiated.”<sup>20</sup>

The connection between limiting a case to its facts and overruling a case is not hard to see. A precedent represents a principle in a case that might in the future apply to other cases. If the principle in a case is limited to that case alone, the case no longer can be a precedent. And so the case now lingers as a decision in a single case, gutted of its principle, and worthless as a reference point for future cases. Since the principle can no longer guide future cases, the case that embodied that principle is all but overruled, except for the singular result.<sup>21</sup>

When we turn to cases where limiting language does work, we find the following interesting reality: There are few cases that use limiting language; indeed, there are only two by my count which actually *limit* cases rather than simply refer to the concept of limiting a case to

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<sup>19</sup> 519 U.S. 102, 576 (1996) (Thomas, J. dissenting).

<sup>20</sup> 525 U.S. 83, 99 (1998) (Kennedy, J. concurring). *See also* U.S. v. Riedel, 402 U.S. 351, 358 (1971) (Harlan, J. concurring) (“Stanley, far from overruling Roth, did not even purport to limit that case to its facts”).

<sup>21</sup> We might ask, why would a court limit a prior case to the facts, rather than simply overrule it, apart from a simple belief in the rightness of the result? A couple of reasons spring to mind. For one, the effect of overruling a case might be moot due to the passage of time – imagine a jail term being overturned for someone who had already died while incarcerated. Another, less benign reason may be that the court better preserves its credibility by sticking to its decision, even while abandoning the principle. Too many overruled cases may look like the court is constantly changing its mind.

the fact. This is not to assert, however, that limiting cases to the facts does not occur without using the phrase “limited to the facts.” But this is not to the point of my inquiry. What I am trying to find out is what the *Bush v. Gore* court was getting at when it used the words “limited to the present circumstances”: what was it trying to signal, by using those words, that particular phrase? And I have tried to discover this by looking to the past uses by the Supreme Court of the phrase. So it does not matter that the Court might have limited cases to the facts without using the phrase “limited to the facts.” What I am concerned about is what the Court does when it *does* use the phrase “limited to the facts.”

A good example of this can be found in the case of *U.S. v. Villamonte*, when it describes how *Ex parte Bain* was “long ago limited to its facts by *Salinger v. United States*.”<sup>22</sup> The language *Salinger* used in limiting the case is instructive: “The principle on which the decision proceeded is not broader than the situation to which it was applied.”<sup>23</sup> This all but says that the principle involved in that case is now empty: it is a principle that was truly a ticket good for one day only (or at least now it is that). Justice Kennedy gave a nice example of how a case slowly dies by being limited to its facts in *Lee v. Kemna*, decided one year after *Bush v. Gore*.<sup>24</sup> In referring to *Henry v. Mississippi*'s<sup>25</sup> lack of “significant precedential effect” he notes that the case on which it relied *Fay v. Noia*<sup>26</sup> had been “limited to its facts” in *Wainwright v. Skyes*<sup>27</sup> before finally being “put to rest” by *Coleman v. Thompson*.<sup>28</sup> Other uses of the phrase “limited to its facts” confirm this impression of limiting being a functional stand-in for (or prelude to)

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<sup>22</sup> 272 U.S. 542 (1926).

<sup>23</sup> *Id.* at 549.

<sup>24</sup> 534 U.S. 362 (2001)

<sup>25</sup> 379 U.S. 443 (1965)

<sup>26</sup> 372 U.S. 931 (1963)

<sup>27</sup> 433 U.S. 72 (1977)

<sup>28</sup> 501 U.S. 722 (1991).

overruling, if not the decision, then the principle that the decision relied on.<sup>29</sup> Consider, for instance Justice Warren’s analysis of an earlier case *Rutkin* which limited *Commissioner v. Wilcox*<sup>30</sup>: “In *Rutkin* the Court did not overrule *Wilcox*, but [limited it to its facts]. However, examination of the reasoning used in *Rutkin* leads us inescapably to the conclusion that *Wilcox* was thoroughly devitalized.”<sup>31</sup>

This helps explain another apparent use of limiting language as narrowing that Ernest Young uses to defend his claim that the limiting language in *Bush v. Gore* is merely “boilerplate.”<sup>32</sup> In *Bartnicki v. Vopper*,<sup>33</sup> Justice Breyer writes, in concurring with the decision, that “I agree with [the Court’s] narrow holding limited to the special circumstances present here.”<sup>34</sup> Now, it must be said that it is very confusing what Breyer is doing here.<sup>35</sup> On the one hand, it seems that Breyer is doing exactly what the Court in *Bush v. Gore* has done, which is to say that the holding is limited to the present circumstances and to then go on give a somewhat

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<sup>29</sup> There is one use of limiting language in the Court’s *Rosenberger* decision that strikes me as misleading. The Court there describes *Marsh v. Chambers* as limited to its unique history (the case involved the constitutionality of prayers held before a legislative session). *Rosenberger v. University of Virginia*, 515 U.S. 819, 873 n.2 (1995). Souter says that the case expressly limited itself to the facts by pointing to its unique history. In fact, I think this is a misreading of what principle the Court was expounding in *Marsh*: it was the principle that looking at historical patterns is relevant to interpreting the Establishment clause. See *Marsh v. Chambers*, 463 U.S. 783, 79. What is interesting, and what will gain greater salience when we get to the theory of precedent in part II is how expansive or narrow “unique” has been read in *Marsh* and in subsequent opinions. In *Marsh*, “unique” was held to be more than simply the *very fact* of Congress passing the first amendment on the same day that it approved legislative prayers. It was held to involve the nation’s history of approving public religious observance. *Marsh* has also been used in other cases to support the idea that the nation has a history of public religious observance and that this is relevant to interpreting the first amendment in instances other than legislative prayer. See *Lynch v. Donnelly*, 45 U.S. 668 (1984). This shows an important point: *Rosenberger* is itself an interpretation of the narrowness or broadness of *Marsh*. *Marsh* itself does not announce that in its narrowness it will only be limited to its own facts, only that the history it refers to is “unique.” But uniqueness is not the same as being *singular*, as indeed *Marsh* itself and its progeny make clear. There is no linguistic contradiction in saying that “*these cases are unique in this respect*” because they all involve a practice with a long history.” And so it is ultimately not clear whether *Marsh* is an example of a case limiting itself to the facts, even if *Rosenberger* can be understood as treating it as such

<sup>30</sup> *Commissioner of Internal Revenue v. Wilcox*, 327 U.S. 404 (1946).

<sup>31</sup> *James v. U.S.*, 366 U.S. 213 (1961).

<sup>32</sup> Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1153 n.49 (2002).

<sup>33</sup> 532 U.S. 514 (2001).

<sup>34</sup> *Id.* at 535.

<sup>35</sup> I am not the only one who thinks this. See Sonia R. West, *Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951, 1954 (“The concurring opinion begins promisingly enough. ... It is in the second sentence where things become fuzzy”).

generalized description of those circumstances. So this does seem to be a very good example of the language of limiting the holding to its facts actually narrowing the case, rather than saying simply that the principle is good for one case only. After all, it is possible that the special circumstances might repeat themselves, and so we can read the limiting language as emphasizing that those circumstances are rare.

On the other hand, and this is what makes this case on all fours with *Pacific Federation*, Breyer is writing in a concurrence, not in the majority. He is writing separately and trying to limit the reach of the majority opinion (while proposing his own principle). So Breyer is trying in the concurrence to limit the precedential value of the opinion because, in fact, he believes that a different principle should govern the case. The majority does not use the language of limiting in its opinion, and it is unclear whether it believes that the principle it is articulating is indeed ‘narrow.’ So we should not read Breyer here as accurately describing what the majority is doing, just as we shouldn’t have taken Brennan’s description of what the majority was doing in *Pacific* at face value. For a concurrence using limiting language is trying to anticipate a future overruling or nullification of the principle adopted in the majority opinion. It is trying to predict that a different principle will be adopted. In this way, we should treat limiting language in a concurrence as trying to do the same thing that a later case does when it limits a case to the facts, except that it is trying to do it at the time the case is decided, rather than later on. Because the opinion is only the concurrence and not the majority, Breyer is trying to do rhetorically what only a later majority Court can do actually.<sup>36</sup>

With the history behind us, and the few examples of limiting language in the Court’s history, we are now in a position to see the true strangeness of the limiting language in the Bush

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<sup>36</sup> For more examples of this “persuasive” use of limiting language, see Flanders, *Limited to the Present Circumstances*, *supra* note 18.

decision. The strangeness does not lie in the language itself – for as we have seen, the court will often limit a decision to its facts, and by doing so, not merely articulate a narrow principle, but in fact limit the decision’s principle only to that case. The strangeness of *Bush*, however, comes when we see that the court does this only when it wants to repudiate the principle behind a previous case, and leave only the result. What *Bush* does is to employ language that repudiates the principle of a case *in dealing with its own case*. So this is truly strange, given the Court’s past use of limiting language. So it is no surprise that lower courts have had a hard time figuring out the precedential value of *Bush v. Gore*, and if indeed, *Bush v. Gore* can be used as a precedent.

## II. *Bush v. Gore* and the Nature of Opinions

*Bush v. Gore* occupies a unique place in the history of the Supreme Court’s jurisprudence, at least if the analysis of the historical record I have given in the previous part is accurate. No other case has in its opinion used limiting language on itself. The question that I want to ask in this part is what we are to make of this move by Court. It will not do, I think, to say simply that because the court has never done this before, the move is ipso facto illegitimate. Even though the court has never done it before, why couldn’t it do it now, for the first time? Enough has been said about the uniqueness of the circumstances of the 2004 election that it is not on its face implausible that such a unique set of circumstances should merit a unique jurisprudential response. We cannot simply rebut the *Bush* court’s “there is the part we say and the part we take it back” gesture simply by saying that it is unprecedented.

For this does not yet solve the problem presented by *Bush v. Gore*, because we have to ask in a normative sense whether *Bush v. Gore* is actually *an opinion*. That is, we have to ask first whether there was anything in *Bush v. Gore*, apart from the limiting language that the limiting language actually negated! Although it may sound trivially true that there was something the limited language nullified, this has not been at all clear to critics. Many have suggested, or have seemed to suggest, that *Bush v. Gore* is so poorly reasoned, so insincere in its avowed principles, that it cannot be taken seriously as an opinion and so even bracketing the limiting language, *Bush v. Gore* has no precedential value.<sup>37</sup> This is wrong, I believe, for it does not matter to an opinion's normative status as an opinion that it is badly reasoned or even insincere.<sup>38</sup> And if this is right, I think it follows that *Bush v. Gore* is an opinion and so has precedential value. This gives us a basis for saying that the language limiting *Bush v. Gore* only to the present circumstances, and so depriving *Bush v. Gore* of any precedential value, should be disregarded.

This part approaches the question of whether *Bush v. Gore* should be treated as precedent indirectly, by examining a recent debate over the precedential value of unpublished circuit court opinions. Although that the debate has since been resolved by fiat,<sup>39</sup> the debate raised issues about when something has precedential value, which are useful in the present circumstances. To telegraph my punch, the debate over unpublished opinions shows us something about the normative status of an *opinion* as opposed to something that merely resolves a particular case. An opinion necessarily extends beyond the present circumstances and so has precedential value.

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<sup>37</sup> For someone who almost suggests that *Bush v. Gore* is so poorly reasoned as to not count as an opinion, see Lawrence Tribe, *Freeing eroG v. hsuB From Its Hall of Mirrors*, in *A BADLY FLAWED ELECTION* 132 (Ronald Dworkin, ed. 2002).

<sup>38</sup> In making this point I follow and elaborate on Fiss, *The Fallibility of Reason*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY* (Bruce Ackerman, ed., 2002).

<sup>39</sup> The Supreme Court voted in April 2006 to allow lawyers to cite unpublished opinions in their briefs.

On this criterion, *Bush v. Gore* is an opinion, no matter how badly reasoned. Being an opinion, in the sense I am interested in, is a formal criterion, and does not depend on the merit of the substance of the opinion. While this may make trouble for lower courts that have to wrestle with the theoretical inelegancy of the opinion, it does not deprive the opinion of its status as an *opinion*.

## 1. The Debate over Unpublished Opinions

For the past several years, until it was resolved by fiat in 2006, a debate raged among federal judges about the use of so-called unpublished opinions, or memdispos, as they are called. Such opinions were truly tickets good for one case only, and (prior to the change) could not be cited by litigators for their precedential value. Judges, it seemed, favored them at least in part for reasons of efficiency. If federal judges had to write opinions for every single case, setting out in detail the reasons for their decision and the rules used, the task of judging would be nearly impossible. Critics objected that limiting the citation to unpublished opinions was a clear violation of rule of law values, because it allowed the courts to act in a simply lawless manner, knowing that their decision in an unpublished opinion could not be used against them in a later trial.

I do not propose to resolve this debate in any conclusive way here, although it is clear that it has much resonance with the question of the precedential value of *Bush v. Gore*. My interest in that debate is much narrower and involves how we are to initially make the distinction between a memdispo, which resolves only a particular case and is good for that case only, and an opinion, which extends beyond the present case. In the course of the debate, a distinction was

made by some judges between merely offering a memdispo on a particular case, which limited its precedential value to that case alone, and writing an opinion, which had implications for other cases. An opinion, it was clear to these judges, had precedential value, even it was an open question whether a memdispo did or could have that kind of value. But what was it about an opinion that gave it that clear precedential character?

Judges Kozinski and Reinhardt, in an influential and widely cited article, made the distinction between a memdispo and an opinion in the following way:

Writing a memdispo is straightforward. After carefully reviewing the briefs and record, we can succinctly explain who won, who lost, and why. We need not state the facts, as the parties already know them; nor need we announce a rule general enough to apply to future cases. This can often be accomplished in a few sentences with citations to two or three key cases.

Writing an opinion is much harder. The facts must be set forth in sufficient detail so lawyers and judges unfamiliar with the case can understand the question presented ... The legal discussion must be focused enough to dispose of the case before us yet broad enough to provide useful guidance in future cases.<sup>40</sup>

I am not sure as a matter of principle this distinction holds up, although the two judges make a convincing argument that in practice, writing a memdispo will be different than writing an opinion. The writing of a memdispo is “straightforward” and need not be very long (only a few sentences and citations to a few cases). But does this difference in practice amount for a

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<sup>40</sup> Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Opinions*, CALIFORNIA LAWYER, June 2000, at 43.

difference in principle? The opponents of not citing memdispos will argue that to decide a case and explaining why someone won and someone lost, however “succinct” the explanation, is to give a reason, and reasons by their nature are general, they extend beyond the facts of the present case. Although a general rule may not be announced, a reason is, and this reason may have a bearing on how a future case is decided. If a case that is sufficiently similar to the previous one comes up, then the reason used to justify the result in the previous case can apply to the later (and similar) one. This is why it is significant that the Bush Court felt that their opinion had to be limited by the use of explicitly limiting language, rather than just a narrow explanation of the circumstances. In the same way, there needs to be an external constraint (or convention) that limits the memdispos to only the holding.

I think this is a powerful argument. Perhaps memdispos can be justified on pragmatic grounds, as necessary for the business of judging to get done, but it is harder to show that there is in fact a principled distinction between writing a short opinion that explains who won and why and a longer opinion that develops a rule.<sup>41</sup> If the past decisions of a court bind the court in the future, as we are assuming, the distinction between a memdispo and an opinion seems ad hoc. Both rules and reasons are general, and can therefore be applied beyond the present instance. Giving reasons means making a commitment.<sup>42</sup>

Although this line of argument strikes me as persuasive, it is not my present concern to develop it much further. In fact, the distinction made in practice by these judges is enough for our present purposes. For it shows – no matter the whether there is a principled distinction between memdispos and opinions – that judges recognize when something has what we can call the normative status of an opinion. And it is not merely that an opinion is longer, but that

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<sup>41</sup> Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2D 17, 20 (2000).

<sup>42</sup> See Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995).

opinions announce as the judges say elsewhere in their article “new rules of law or extensions of existing rules.” As we saw in the last part, a rule can be narrow or broad, but an opinion *qua* opinion will announce a rule. This is important, and shows that even though a memdispo might articulate a rule (in the form of a reason) it will not do this explicitly; it will not, in the words of the judges, “announce” that it is making a new rule or extending an existing rule. By announcing a rule, the opinion says that it should be taken to apply to other cases in the future, that is, the opinion should be treated as a precedent, and so to be followed by lower courts and by the issuing court itself.

## 2. Is *Bush v. Gore* an Opinion?

I think it is obvious that the Supreme Court in *Bush v. Gore* articulates a rule and so is an opinion in according to the minimal definition supplied by Kozinski and Reinhardt. To be sure, there is an open question about the broadness and narrowness of this rule, that is, whether it just covers statewide remedies or extends further, to other irregularities involved counting votes and even to differences in voting machinery between counties. This is a matter of interpreting the case and the principle that can be found to motivate the case. But it seems to me hard to argue that there is no rule announced in the case and on which the per curiam opinion bases its decision, even if we concede that it is a bad rule.<sup>43</sup> Still, I should belabor the obvious, because by belaboring it, we can see why the limiting language is so vital in turning a narrow, but principled decision, into a case that is good for one case only.

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<sup>43</sup> See, e.g., Cass Sunstein, *Order Without Law*, in *THE VOTE* 215 (Cass R. Sunstein & Richard A. Epstein, eds., 2001).

We can say, roughly, that there are two principled readings of *Bush v. Gore*. On one side, there is the broad reading that finds in *Bush v. Gore* a principle that each person has an equal right to have his vote counted. This broad reading sees *Bush v. Gore* as part of the third generation of equal protection voting rights cases. The first generation expanded voting from men to former slaves to women and then to those over 18. The second generation guaranteed the right to an equally weighted vote, by adopting the principle ‘one person, one vote.’<sup>44</sup> The third generation embraces the principle that differences in the ability to have one’s vote counted equally with every other person’s vote is also an equal protection violation. Accordingly, this principle would not restrict itself merely to after when a vote is cast, but will also be concerned with making sure that the technology which records votes in the first place is the same (or nearly the same, or the same as feasible) within states, and even perhaps across the nation. Cass Sunstein has called this right which some have found in *Bush v. Gore* as the right to an equal chance of having one’s vote count.<sup>45</sup>

On the other side, there is the narrow principle, which is articulated in the narrowing language of *Bush v. Gore*, which immediately follows the limiting language (“the decision is limited to the present circumstances”). The narrowing rule from the case would be that there must be some “rudimentary” form of equal treatment in the context of a statewide recount when this has been ordered by a state court. It is important to see that this rule is still a *rule* even though it is narrow. Indeed, even if we view it (as seems plausible) as simply a definite description of the situation in *Bush*, it is still the case that it is a rule. It can extend beyond the present circumstances to another circumstance, albeit only one that is exactly like the circumstances in *Bush v. Gore*. It does not by itself limit the holding of the case to *Bush v. Gore*.

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<sup>44</sup> Reynolds v. Sims, 377 U.S. 533 (1964).

<sup>45</sup> Sunstein, *The Equal Chance to Have One's Vote Count*, 21 LAW & PHILOSOPHY 121 (2002).

This is why the limiting language is vital, and has a separate function than the narrowing language does. Only the limiting language expressly limits the holding of *Bush v. Gore* only to *Bush v. Gore*. Without the limiting language, we would have a principled opinion, albeit a narrow one.

If it is right that – again bracketing the limiting language – *Bush v. Gore* articulates a rule (whether that rule is broad or narrow) then it follows, relying on Kozinski and Reinhardt in their discussion of *memdispos*, that this rule is precedent and should be followed by lower courts and should bind the issuing court. The only thing that prevents us from stating that it is an opinion in the normative sense I have just articulated is the limiting language. But now we face the paradox: the *Bush v. Gore* decision, taken as a whole, is at odds with itself. It turns into something like Rene Magritte’s famous painting with a picture of a pipe and the label “this is not a pipe.” *Bush v. Gore* is an opinion that announces a new equal protection rule, but at the same time says that the rule is not to be followed, that in fact, *Bush v. Gore* is not an opinion (at least according to the normative definition of opinion introduced in this section).

### 3. Hasen on the Precedential Value of Bush

But we can perhaps make this tension of the *Bush v. Gore* opinion less acute if we instead make more demanding our standard for what counts as an opinion, by importing other considerations. That is, perhaps it is too quick simply to adopt a minimal normative understanding of what constitutes an opinion (which *Bush v. Gore* meets) and instead make the standard for an opinion more robust than simply announcing a rule, *pace* Kozinski and Reinhardt. If we did this, then we could reduce the tension between the limiting language and

the broad rule-like language of the opinion itself: the limiting language would not be necessary because there would be no rule (that had any sense) to limit. In this section, I briefly consider one attempt to do this.

In an influential article,<sup>46</sup> Richard Hasen has listed three reasons why we should not interpret *Bush v. Gore* as binding precedent. He says that there are three “good reasons for doubting that the Supreme Court majority intended anyone to take their equal protection seriously”:

[1] Language in the per curiam opinion limits it to the facts of the case, or, at most, to cases where jurisdiction-wide recounts are ordered. Moreover, [2] the Court’s own analysis was superficial. ... Finally, [3] the kind of equal protection claim favored by the conservative Justices in the *Bush v. Gore* majority is a strong departure from the usual equal protection they favor.<sup>47</sup>

I want to bracket the first consideration (about the use of limiting language) in what follows, although it is interesting to speculate whether the other two reasons would indeed be counted for not taking the opinion seriously in the absence of explicit limiting language. Would we hold that other cases that were poorly reasoned or inconsistent with Justices’ other opinions to lack significant precedential value, simply because they were poorly reasoned or inconsistent? Or is it only the limiting language that makes these other aspects of the opinion salient? In other words, it is unclear whether we need the limiting language in order to make it the case that the other two factors matter, because they *explain* why the case needed to be explicitly limited in the

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<sup>46</sup> Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FL. ST. U. L. REV. 377 (2001). Hasen’s article was the basis of a disagreement in a 6th Circuit case, which I discuss in the next part.

<sup>47</sup> *Id.* At 378-9.

way that it was explicitly limited. On this interpretation of Hasen's point, the limiting language is ineliminable if we want to limit the case to the facts, as opposed to criticizing the case on other grounds.

Put this particular interpretive question to one side. Our question now is, bracketing the limiting language of *Bush v. Gore*, should the fact of a case being poorly reasoned and inconsistent with the Justice's other opinions on the same topic *by themselves* make an opinion less of a precedent? That is, can we say an opinion *qua* opinion in the normative sense, loses its binding power to the extent that its reasoning is poor or insincere? I do not think we should do this, unless we want to radically depart from a plausible understanding of Supreme Court precedent, which does not make whether to follow precedent a sliding scale based on the merit of the decision. Hasen does have a good point, but it is not a point about the force of *Bush v. Gore* as a precedent.

Begin by making a distinction between the practical fact of an opinion being a precedent and the theoretical basis of the opinion as precedent.<sup>48</sup> An opinion just by virtue of being opinion in the minimal sense I expressed in the last section should, I think, be considered practically a precedent, which means that lower courts are bound by its reasoning (however poor or insincere), and the issuing court, in this case the Supreme Court, is bound by it until it changes its mind. In this practical sense, there is no question whether if some case articulates a rule, then that rule is binding on lower courts and the Court that issues the opinion. This is so even if it turns out in fact that the equal protection rationale was simply a rhetorical smokescreen, a justification that was easier to understand than the Article II argument.<sup>49</sup>

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<sup>48</sup> I borrow the distinction from Grant Lamond, *Precedent and Analogy in Legal Reasoning*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/legal-reas-prec/> (last visited Dec. 31, 2007).

<sup>49</sup> See, e.g., Jed Rubenfeld, *Not as Bad as Plessy. Worse*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY* 20 (Bruce Ackerman, ed. 2002).

So we should note that acknowledging an opinion has practical precedential force is consistent with thinking that, at the same time, the theoretical basis of that opinion is very weak, and that if we considered simply the opinion as an argument, we might not find it very persuasive. My sense is that theoretically Hasen is right on target; he is correct that if we look at the equal protection rationale in *Bush v. Gore* it seems very weak and poorly reasoned, and we should likewise be suspicious of the motives of the Justices who made it. But this does not weaken the fact that the opinion is still practically a precedent, and the lower courts are bound by it and its theoretical rationale, however weak. Until the higher court speaks, in this case the Supreme Court, the lower courts cannot avoid having to try to make sense of the principle of the opinion as best they can.

The issue that is raised in Hasen's proposal, then, comes down to this: whether *Bush v. Gore* is so different in kind from other opinions decided by the Supreme Court as to not be a recognizable decision of principle in any way. This is a heavy burden to bear, for it is not the burden of showing that the reason was poor, or that the Justices were insincere (because the principle exists independently of the motives of those who invoke it), but that the decision had not principle animating at all, not the wrong principle or an incompletely articulated principle, but not *any* principle. I do not think that this heavy burden can be borne by the critics of *Bush v. Gore*, because however cynical we may be about the motives of those who proposed the equal protection rationale, it is a stretch to say that it is not recognizable *qua* rationale.

Moreover, the principle can be a new principle, so that *Bush v. Gore* did indeed establish (as has been argued) that it in *Bush v. Gore* established a new tier of equal protection.<sup>50</sup> Once there is a rule announced, it is up to the lower courts to determine it as best as they can, and if the

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<sup>50</sup> See the discussion in Fiss, *The Fallibility of Reason*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY* 88-9 (Bruce Ackerman, ed., 2002)

Supreme Court eventually wants to discard it, it must meet the principle with another principle. Until the Court does discard the principle, it retains its practical force as precedent. The factors (other than the limiting language) mentioned by Hasen are irrelevant to the status of the opinion as *an opinion*, but they do matter to how much work the lower courts have to do in making sense of the principle of *Bush v. Gore*.<sup>51</sup>

So we are left with the strange amalgam that is *Bush v. Gore*, the opinion with the label that says it is not an opinion. If we chose to emphasize either aspect of the decision (the opinion or the label that says it is not an opinion) we have a paradox. If we stress *Bush v. Gore*'s status as an opinion, we have to reinterpret the limiting language in a narrowing way so that *Bush v. Gore* is the first instance (or one of the rare instances) where limiting language is used in a way to articulate a narrow principle, rather than to nullify the principle at issue in the case. If instead, we view the limiting language as controlling our understanding of the opinion, we have the first instance of limiting language being used to nullify the principle *in the case in which the principle is articulated*. Either way, *Bush v. Gore* enters into distinctively new territory.

### III. *Bush v. Gore* in the Circuit Courts

The result of the above two parts is that *Bush v. Gore* yields a contraction: it is at once an opinion that limits itself to the present circumstances (if we take its limiting language seriously) and also an opinion that announces a broad rule, capable of being applied in other like circumstances. In the first part, I argued that if we take the limiting language on its face, it is very hard to read it as merely narrowing the principle involved in the case. By using the

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<sup>51</sup> Admittedly, the line between the practical and theoretical might be fuzzy on occasion. For instance, a poorly reasoned decision may be less likely to be cited by the Supreme Court in the future or it may stand a better chance of being overruled.

language of *limiting* rather than narrowing, the court in fact was firmly in a tradition of nullifying a case by limiting it to a single set of facts. Thus, rather than being an example of a minimalist opinion, the opinion was in fact subminimalist.

In the second part, I adopted a definition of “opinion” that Kozinski and Reinhardt used in making their case against the precedential effect of memdispos. Opinions, they wrote, announce a rule, and a rule which can be applied in future cases. I defended this use of “opinion” against a more normatively robust one, which would have it that only opinions that are sincere or well-reasoned should have precedential effect. Although theoretically some opinions may be poorly argued, this does not diminish their precedential weight *in itself*, although it may make it harder for lower courts to articulate what the principle behind the case was. If the Supreme Court wants to distance itself from an earlier, poorly-reasoned decision, they have to do so via another decision, and with (hopefully) better reasons.

In fact, this contradiction can only be undone by an act of will by the Supreme Court. So long as it remains silent on *Bush v. Gore* – treating it as the case that must not be named by not citing it at all<sup>52</sup> – there is no real answer to the question of what the precedential value of *Bush v. Gore* is. As it stands, the opinion is unstable, both pointing forward in its equal protection language, and yet pointing backward in its limiting language. But although this brings an end to the theoretical inquiry (there is no answer about the precedential value of *Bush v. Gore* because of this contradiction), it leaves open the eminently practical question of what lower courts are to do in the meantime. The Court might be able to go on not mentioning *Bush v. Gore*, but lower courts do not have this luxury, when faced with issues that on their face resemble *Bush v. Gore*. What are they to do?

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<sup>52</sup> See Adam Cohen, *Has Bush v. Gore Become the Case That Must Not Be Named?*, N.Y. TIMES, August 15, 2006.

## 1. *Shelley*

The first real test of *Bush v. Gore* in a circuit court came in *Southwest Voter Registration Education Project v. Shelley*.<sup>53</sup> In the prelude to what was going to be en banc reversal, a Ninth Circuit panel enjoined the California gubernatorial special election, based on the claim that different vote-counting procedures treated voters differently – a violation (the Plaintiffs claimed) of the equal protection clause as specified under *Bush v. Gore*. The circuit court wrote that the plaintiffs’ claim presented “almost precisely the same issue as the Court considered in *Bush*, that is, whether unequal methods of counting votes among counties constitutes a violation of the Equal Protection Clause.”<sup>54</sup>

Interestingly, the Court went on to interpret the narrowing (as opposed to the limiting language) of *Bush v. Gore* against it, saying that was not merely a matter of different localities using different standards “in the exercise of their expertise” but instead a situation where the Constitution required “some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.”<sup>55</sup> This was a clever move. The language of *Bush v. Gore* on first reading seems designed to exclude those cases where there was merely a matter of different counties using different methods for conducting elections (and for *voting* rather than for recounting). The three-panel court instead took *Bush v. Gore* to be making a distinction between those cases where there is a matter of differing expertise in managing an election, on the one hand, and those cases where an election is being so badly managed that it rises to the level of a violation of fundamental fairness, on the other hand.

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<sup>53</sup> *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 882 (9th Cir. 2003), *reversed on Rehearing En Banc*, 344 F.3d 914 (9th Cir. 2003).

<sup>54</sup> *Id.* at 895.

<sup>55</sup> *Id.* at 895-6 (quoting *Bush v. Gore* 531 U.S. 109 [2000]).

In terms of the distinctions I made in the last two Parts, the circuit court has here turned a sentence that seems to suggest the *narrow* principled ruling of *Bush v. Gore* into support for the *broad* ruling. The argument by the circuit court tests whether the language of *Bush v. Gore* supports an intervention in a case where different voting methods look to be less a matter of differing expertise and more a matter of fundamental unfairness. According to this reading, even different voting methods can be instances of unfairness when they are not a matter of “expertise.” Again, this is a clever move, because it teases out of the ostensibly narrowing language of *Bush* a broader principle. The court may be right or wrong in doing this, but it is clear that in doing so they must ignore the clear force of the limiting language. For if we take the limiting language as controlling – and if we take it in the way I have suggested in Part I – we must read what follows it as merely giving a definite description of the “present circumstances” of the *Bush v. Gore* case. This is not what the three-panel Circuit Court did. In fact, it ignored the specifically limiting language.

Surprisingly, so did the en banc panel that reversed the 9th circuit decision. In fact, in reversing the decision, they simply thought it was sufficient to quote again the line of *Bush v. Gore* that the original panel did: that the question before the court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. But this ignores the different interpretation of the same words. In fact, the court did not even take up the equal protection claim of *Bush v. Gore* at all, as presented by the earlier court, choosing to dismiss it in a paragraph.

But there is a ready explanation for this. The court’s task was not to decide the merits of the issue but only whether the district court abused its discretion “in holding that the plaintiffs

have not established a clear probability of success on the merits of the equal protection claim.”<sup>56</sup>

In other words, the question was not whether there was a sound equal protection claim, but whether the election should go forward or not. And on this, the en banc court noted that decisions to go forward with elections have been made “even in the face of an undisputed constitutional violation.”<sup>57</sup>

In many ways, the *Shelley* decision was a bad forum for testing what the limiting language meant in *Bush v. Gore*, and whether it should control, or whether the principle that decides the opinion should. First, there was the fact that neither of the courts grappled with the problem of the limiting language, choosing instead to focus on the narrowing language, without acknowledging the significant *caveat* that preceded it. Second, the standard for deciding the case was not the validity of the equal protection claim, but only whether the district court judge abused his discretion by denying that there was a “clear probability of success” of the merits. The en banc court did not think that it had to distinguish *Bush v. Gore* itself, only to note whether it thought it could be done within reason.<sup>58</sup>

## 2. *Stewart*

A slightly better case was presented by the opinion in the 6th Circuit, *Stewart v. Blackwell* – better not in the sense that the facts were better (I am not concerned with that here) but better in that it engaged the question of *Bush v. Gore*’s precedential value. The facts of the case dealt with what many have seen as the much more pressing equal protecting question of

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<sup>56</sup> *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003).

<sup>57</sup> *Id.*

<sup>58</sup> Dahilia Lithwith argues that the 9th Circuit was simply having “fun” with *Bush v. Gore*. I disagree. See her *Fun With Bush v. Gore*, SLATE, Sept. 17, 2003, <http://www.slate.com/toolbar.aspx?action=print&id=20885554>.

different types of voting machines – the unreliable punch-card machines and the more reliable optical scanners – in different counties.<sup>59</sup> In ruling in favor of those challenging the different machines, the majority of the panel relied on *Bush v. Gore*, stating that it “reiterated long established Equal Protection principles” and commended the opinion as the first case that recognized the “developing problem with technology that we confront today.”<sup>60</sup> The Stewart court, as the *Shelley* circuit panel did before, this time using slightly different sections of the Bush ‘narrowing’ language, held that equal protection required some “minimal procedural safeguards” such that there is some assurance of that the standards of fundamental fairness are satisfied.<sup>61</sup>

The dissent, however, vigorously took issue with the majority’s use of *Bush v. Gore*. Unfortunately, he confused issues when he relied on Hasen’s article, cited and discussed in the previous part of this essay. Along with noting the limiting language, the dissenting judge quoted Hansen to the effect that the court’s reasoning was poor and possibly insincere. This enabled the majority to avoid grappling directly with the problem that the limiting language explicitly posed. The majority was able, instead, to respond by saying that “murky, transparent, illegitimate, right, wrong, big tall, short or small; regardless of the adjective one might use to describe the decision, the proper noun that precedes it – ‘Supreme Court’ – carries more weight with us.”<sup>62</sup> The response by the majority is true as far as it goes, but the question is precisely *how far* it goes.

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<sup>59</sup> See e.g., Pamela Karlan, *The Newest Equal Protection: Regressive Doctrine on a Changeable Court*, in THE VOTE 77 (Cass R. Sunstein & Richard A. Epstein, eds., 2001).

<sup>60</sup> *Stewart v. Blackwell* 444 F.3d 843, 859 n.8 (2006) (“Of note, *Bush v. Gore* appears to be the first case where a court recognized the developing problem with technology that we confront today”).

<sup>61</sup> The *Stewart* court does at one point explicitly discuss the “limiting” language of *Bush*. They focus, however, on the latter clause of the limiting statement in *Bush*: “for the problem of equal protection in election processes generally presents many complexities.” *Bush v. Gore*, 531 U.S. 98, 109 (2000). The *Stewart* court comments that the Supreme Court “quite correctly” notes this. *Stewart* at 859 n.9. But it does not seem to me that the latter part of the limiting statement helps much. If anything, it makes clear that *Bush* is an opinion that is good for one case only – the additional language only explains *why* (because the issue is generally very complex).

<sup>62</sup> *Stewart* at 859 n.8.

*Bush v. Gore* is no ordinary opinion; if it was, then the rebuttal by the majority would have been sufficient, which is that lower courts do not have the discretion to pick and choose which Supreme Court opinions they follow simply because they disagree with the reasoning or find it wanting in some respect. In the terms I used in the previous decision, *if Bush v. Gore is an opinion*, there is no question of its practical precedential weight, no matter how theoretically confusing the opinion might be.

Thus, we have to treat carefully the claim made by the majority that “Respectfully, the Supreme Court does not issue non-precedential opinions.”<sup>63</sup> As we’ve seen from the first part of this essay, this is not entirely true. The court does limit some cases to the facts as a means of nullifying the principle underlying the decision in those cases. These opinions then become non-precedential. But (as we also saw) *Bush v. Gore* is unique in that it seemingly limits its principle to the facts of the case at the very time it is deciding that case. So we have to be cautious in saying, as the majority does, that all Supreme Court opinions have precedential value, because it is ultimately unclear whether *Bush v. Gore* does, or whether the principle enunciated the opinion only has “theoretical” prudential value – that is, whether its value is only to the extent that it makes a persuasive argument about the trajectory of equal protection cases.<sup>64</sup> The question of *Bush v. Gore*’s practical prudential value is one that is not given a clear answer in *Bush v. Gore*. It can’t be, because nothing before *Bush v. Gore* had prepared us for how it uses limiting language.

As I’ve already intimated, this question (of the practical prudential value of *Bush v. Gore*) is an impossible one for the lower courts to answer, because it can only be solved by an act of

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<sup>63</sup> *Id.* at 874 n.22.

<sup>64</sup> Even if it did this, it may be of limited value, for it is usually agreed that the equal protection ruling is a significant departure from past precedents, even if we can tell a story of how it fits with those past precedents. The point is, no one could have read *Bush v. Gore* from, say, *Harper* or *Baker v. Carr*.

will by the Supreme Court. Only the Supreme Court can say whether its (unique) limiting of the facts of a case in the case itself is meant to be taken seriously, or whether the opinion should be read *as* an opinion, and so the principle of equal protection. The dissent would have been better off avoiding the issues of whether *Bush v. Gore* was well reasoned or not, because the question of its practical precedential value is prior. If the opinion in *Bush v. Gore* is an opinion in the normative sense, the lower court would have to at least *try* to make sense of it.

By the same token, the majority should have been clearer about its relation to the limiting language of *Bush v. Gore*. Instead, it chose to pick nits in the way the dissent presented the argument about the precedential value of *Bush v. Gore*. Ironically, the majority opinion quotes a good model of how its decision might have run: “By adhering to its understanding of precedent, yet plainly expressing its doubts, it facilitated our review.”<sup>65</sup> The majority almost does this. It does an excellent job of showing how *Bush v. Gore* can plausibly be seen as in the line of equal protection cases. But its holding clearly relies heavily on *Bush v. Gore* to make the shift into what has been called the third generation of voting equal protection claims, viz., the equal right to have one’s votes counted. Instead of insisting that it was following precedent, it should have said that it was taking *Bush v. Gore* as precedent, but should have also acknowledged that legitimate doubts can be raised about the precedential value of *Bush v. Gore* because of its limiting language. Because only the Supreme Court can definitively answer the question of what precedential value *Bush v. Gore* has, the majority would not have been out of place in “plainly expressing” its doubts about the bindingness of *Bush v. Gore*.

Finally, the dissent does note that the Court has had many occasions to show its adherence to *Bush v. Gore*, and then lists a number of recent voting rights cases. Hasen has rightly replied to this that many of these cases did not address equal protection, and so a citation

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<sup>65</sup> *Eberhart v. United States* U.S. S. Ct. 403 (2005) (per curiam). The case is cited in *Stewart* at 874.

of *Bush v. Gore* would be inapposite.<sup>66</sup> But the Court cannot continue to do this, and not only because of the lack of guidance it gives to the lower courts. It will have to show whether it agrees with the principle it expressed in *Bush v. Gore* and what the scope of the principle is, or whether it wants to limit it to the facts of the case. As it stands, *Bush v. Gore* is in legal limbo. The Court should not pretend that there is no cost to its legitimacy by pretending as if *Bush v. Gore* does not exist.

## Conclusion

I have, as I stated in the introduction, tried to avoid the merits of the equal protection argument. But this does not mean that there is no issue of principle at stake here. The principle involved is not a substantive one, but a formal one, about the integrity of the court's proceedings, and whether it is bound by the previous reasons it gives and whether it can escape the force of those reasons only short of giving other reasons. It shows another aspect of the legitimacy of *Bush v. Gore*. On the one hand, of course, there is the legitimacy of the decision itself at the time it was made: was it the right decision, did it come out on the right side, was the court correct in intervening? These sorts of question have occupied many commentators, and will continue to do so. On the other hand, there is the question of the ongoing legitimacy of *Bush v. Gore* as a decision that purported to give reasons including crucially the use of the equal protection clause to justify its outcome. Does this principle extend past the facts of *Bush v. Gore*, or was the ticket good for one ride only? This is not the question of whether the principle was the right one, but the prior one of whether the court's decision was based on principle at all. The answer to this

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<sup>66</sup> See Hasen, *Some Additional Thoughts on the Sixth Circuit Opinion in Stewart v. Blackwell, and the Future of Bush v. Gore in Elections*, Election Law Blog, April 21, 2006, <http://electionlawblog.org/archives/00546057.html>.

question depends in part on whether the decision has precedential value and is broader than merely the “present circumstances.” By sticking to the decision, even if it is a bad decision, the court may yet show that the decision was one of principle and not of politics.<sup>67</sup>

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<sup>67</sup> *Cf.* *Planned Parenthood of Southeast Pa. v. Casey*, 505 U.S. 833 (1992) (“Liberty finds no refuge in a jurisprudence of doubt”).